No. 3085.

United States
Circuit Court of Appeals
For the Ninth Circuit.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

J. R. THOMPSON, as County Treasurer of Flathead County, Montana,
Defendant in Error,

and

J. R. THOMPSON as County Treasurer of Flathead County, Montana,
Plaintiff in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
Defendant in Error.

Brief of Northern Pacific Railway Company

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STATE PUBLISHING CO., HELENA, MONT.

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STATEMENT OF FACTS

The complaint in this case embraces three causes of action. Judgment was rendered in favor of the railway company on the first and second causes of action and against the railway company on the third cause of action. The case is before this court on a writ of error issued in be-

half of the railway company to review the judgment dismissing the complaint as to the third cause of action and on cross-writ of error issued in behalf of the county treasurer of Flathead County to review the judgment in favor of the railway company.

The several causes of action in the complaint are for the recovery of taxes paid under protest. The lands against which the taxes were imposed are the property of the railway company and were granted to the Northern Pacific Railroad Company, predecessor of the Northern Pacific Railway Company, by the Act of Congress approved July 2, 1864, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific Coast by the northern route." The first cause of action is for the recovery of taxes paid for the year 1914, the second cause of action for the recovery of taxes paid for the year 1915, and the third cause of action for the recovery of taxes paid for the year 1916. Paragraph VI of the first cause of action reads as follows:

> "That during the entire year 1914 said lands, and all thereof, were unsurveyed. In the year 1913 and during the months of September and October thereof surveys of said lands and other lands in said townships were made in the field by the United States and on December 14, 1914, the plats of said surveys were approved by the Surveyor General of the United States for Montana, and on June

17, 1915, said plats were approved by the Commissioner of the General Land Office and on October 12, 1915, duplicates of the said plats so approved were filed in the land office at Kalispell, Montana, for the district in which said lands are situated." (Rec. p. 3).

Paragraph VI of the second cause of action reads as follows:

"That during the year 1915 said lands, and all thereof, were unsurveyed. In the year 1913 and 1914 surveys of said lands and other lands in said townships were made in the field by the United States and plats of said surveys were approved by the Surveyor General of the United States for Montana, as follows: Township 21 north of range 15 west and township 21 north of range 17 west, December 14, 1914; township 21 north of range 18 west, township 22 north of range 17 west and township 22 north of range 18 west, June 12, 1915; and said plats were approved by the Commissioner of the General Land Office as follows: Township 21 north of range 15 west, and township 21 north of range 17 west, June 7, 1915; township 21 north of range 18 west, township 22 north of range 17 west and township 22 north of range 18 west, December 17, 1915; and duplicates of said plats so approved were filed in the land office at Kalispell, Montana, for the district in which said lands are situated, as follows: Township 21 north of range 15 west and township 21 north of range 17 west, October 12, 1915; township 21 north of range 18 west, March 8, 1916, and township 22 north of range 17 west, and township 22 north of range 18 west, March 15, 1916." (Rec. pp. 6 and 7).

Paragraph VI of the third cause of action is as follows:

> "That on the first Monday of March, 1916, said lands and all thereof, were unsurveyed. In the years 1913 and 1914 surveys of said lands and other lands in said township were made in the field by the United States and plats of said surveys were approved by the Surveyor General of the United States for Montana, on June 12, 1915, and the same were approved by the Commissioner of the General Land Office on December 17, 1915, and duplicates of said plats so approved were filed in the land office at Kalispell, Montana, for the district in which said lands are situated as follows: Township 21 north of range 18 west, March 8, 1916; township 22 north of range 17 west and township 22 north of range 18 west, March 15, 1916." (Rec. p. 9).

In each cause of action it is alleged that the taxes were paid under protest. The action was commenced and prosecuted pursuant to section 2742 of the Revised Codes of Montana of 1907, as amended by an act approved March 10, 1909, providing that taxes which are deemed unlawful may be paid under protest and an action commenced to recover same within sixty days after the 30th day of November of the year in which such taxes are paid (Supplement of 1915 to Revised Codes of Montana, page 438).

A demurrer was interposed to each cause of action and was overruled as to the first and second causes of action and sustained as to the third cause of action (Rec. pp. 11 to 16). Thereupon an answer was filed admitting the allegations of

each cause of action (Rec. p. 17). A motion was filed in behalf of the railway company for judgment on the pleadings and the case was submitted for final decision on this motion (Rec. p. 19). The motion was granted as to the first and second causes of action and denied as to the third cause (Rec. p. 20), and judgment was rendered accordingly (Rec. p. 21).

It is only property in existence and property which has a taxable status at twelve o'clock noon on the first Monday in March of any year that may be taxed for that year.

Sections 2510 and 2511 of the Revised Codes of Montana of 1907.

The district court decided that the approval of the plats of the surveys of the lands in question by the commissioner of the general land office made such lands subject to taxation. (Rec. p. 15). It was in consequence of this decision that a recovery was allowed on the first and second causes of action and denied as to the third cause of action.

SPECIFICATIONS OF ERROR.

1. The district court erred in deciding that the lands described in the third cause of action were subject to taxation for the year 1916.

2. The district court erred in denying the motion of the railway company for judgment on the pleadings as to the third cause of action.

ARGUMENT.

As the entire case is before this court, we will consider and discuss the right of recovery upon all the causes of action stated in the complaint.

Prior to the Act of Congress of July 10, 1886, entitled "An Act to provide for taxation of railroad-grant lands, and for other purposes," lands granted to the Northern Pacific Railroad Company were not subject to state taxation until surveyed and the cost of making the survey paid.

> Northern Pacific Ry. Co. vs. Rockne, 115 U. S. 600.

Section 1 of the Act of Congress of July 10, 1886, provided as follows:

> "No lands granted to any railroad corporation by any act of Congress shall be exempt from taxation by States, Territories, and municipal corporations on account of the lien of the United States upon the same for the costs of surveying, selecting, and conveying the same, or because no patent has been issued therefor, *but this provision shall not apply to lands unsurveyed*: Provided, That any such land sold for taxes shall be taken by the purchaser subject to the lien for costs of surveying, selecting, and conveying, to be paid in such manner by the purchaser as the Secretary of the Interior may by rule provide and to all liens of the United States, all mortgages of the United States, and all rights of the United States in respect of such lands: Provided, further, That this act shall apply only to lands situated opposite to and coterminous with completed portions of said roads, and in organized counties; Provided further, That at any sale of lands under the provisions

> of this act the United States may become a preferred purchaser, and in such case the lands sold shall be restored to the public domain and disposed of as provided by the laws relating thereto. (24 Stat. 143)."

After the enactment of this law all surveyed lands within the general description of the grant to the Northern Pacific Railroad Company became subject to state taxation.

N. P. Railway Co. vs. Myers, 172 U. S. 589.

It will be noted that the section just quoted expressly exempts from its operation unsurveyed lands and impliedly declares that such lands shall not be taxed. But however this may be, as it is impossible to locate or identify the lands granted to the Northern Pacific Railroad company until surveyed it follows that they cannot be taxed by virtue of state laws before they have been surveyed.

Clearwater Timber Co. v. Shoshone County, Idaho, 155 Fed. 612;
Sawyer v. Gray, 205 Fed. 160;
State v. Central Pac. Ry. Co., 25 Pac. (Nev.) 442;
Smith v. City of Los Angeles, 112 Pac. (Cal.) 307.

As the lands in question were not subject to taxation until surveyed, the question for decision is, When did they acquire the status of surveyed lands?

In the case of United States v. Morrison, 240 U. S. 192, the court said:

"The surveying of the public lands is an administrative act confided to the control of the Commissioner of the General Land Office under the direction of the Secretary of the Interior. Act of July 4, 1836, chap. 352, 5 Stat. at L. 107, Rev. Stat. sec. 453, Comp. Stat. 1913, sec. 699. It was competent for the Commissioner, acting within this authority, to direct how surveys should be made, and to require that they should be subject to his examination and approved before they were filed as officially complete in the local land office." (Citing cases.) * * * * *

"By order of April 17, 1879, the Commissioner required that surveyors general should not 'file the duplicate plats in the local land offices until the duplicates have been examined in this office and approved,' and the surveyors general 'officially notified to that effect.' Re F. A. Hyde & Co., 37 Land Dec. 165. It cannot be doubted that this requirement was within the authority of the Commissioner (see Tubbs v. Wilholt, 138 U. S. 134, 143, 144, 34 L. ed. 887, 890, 891, 11 Sup. Ct. Rep. 279); and it necessarily follows that the making of the field survey and its approval by the surveyor general of Oregon did not make the survey complete as an official act. It still remained subject to the examination and approval of the Commissioner, and for that purpose copies of the plat of survey and field notes were transmitted to the Commissioner, who, not being satisfied, required a supplemental report."

In the case of Anderson v. State of Minnesota, 37 Land Dec. 390, it was decided that public lands are not surveyed until the approved plat of survey is officially filed in the local land office. In the opinion it is said:

"The General Land Office circular of January 25, 1904, relative to notice of filing plats of survey, provides that:

Hereafter when an approved plat of the survey of any township is transmitted to the register and receiver by the surveyor general they will not regard such plat as officially received and filed in their offices until the following regulations have been complied with: (1) They will forthwith post a notice in a conspicuous place in their office specifying the township that has been surveyed, and stating that the plat of survey will be filed in their office on a day to be fixed by them and named in the notice, which shall not be less than thirty days from the date of such notice, and that on and after such day they will be prepared to receive applications for the entry of lands in such township.

In the case of F. A. Hyde and Company (37 L. D., 164), but recently decided by this Department, it was held upon the authority of Knight v. United States Land Association (142 U. S. 161, 182), and Michigan Land & Lumber Co. v. Rust (168 U. S. 589, 594), that the power of the Secretary of the Interior to impose regulations for guidance of his subordinates in the land department does not admit of question, and that under surveying regulations, lands are not surveyed or identified until approval of the plat of survey and filing of the plat by your direction in the local land office. It seems, therefore, to be quite clear that within the meaning of the law and regulations thereunder there is no survey of public lands until the approved plat thereof has been filed in the local land office. (See Barnard's Heirs v. Ashley's Heirs et al., 18 How., 43). It is also equally clear that under the authorized regulations above quoted the receipt of the plat at the district land of-

> fice does not constitute a filing thereof. The notice which the local land office is required to publish merely states that the plat has been received and that it '*will be filed* in their office on a day to be fixed by them and named in the notice'."

It has always been the holding of the land department that a survey is not effective and does not become final until the plat is filed in the local land office and this holding has been accepted by the courts as correct.

> Tubbs v. Wilhoit, 138 U. S. 134;
> Frasher v. O'Connor, 115 U. S. 102;
> United States v. Curtner, 38 Fed. p. 1.

In the case of United States v. Curtner, cited above, in an opinion by Circuit Judge Sawyer, concurred in by Justice Field, it is said:

> "The lands in question lying in township 3 S., stand in no different situation from those in township 2 S., except that they were surveyed in the field by the United States deputy-surveyor in August, 1862, and a plat thereof was made and approved by the surveyor general on December 24, 1862; but a certified copy was not filed in the office of the register of the land office of the district embracing the lands until June 4, 1869. This plat (so filed in 1869) is regarded by the interior department as official, and the survey as made of the date of filing. A plat approved by the surveyor general December 18, 1865, however, was filed in the district land office on December 28, 1865, this being the first plat filed in that office; but this map is not regarded by the interior department as official, as it had not at that time been ap-

proved and adopted by the department. Were it otherwise, this filing was too late. Unless the actual survey in the field, and making and approving a plat by the surveyor general without filing it, or a certified copy of it, in the local land office, places the lands in the category of surveyed lands in contemplation of law, then these lands were also seselected before they were surveyed by the United States, and the selections were void. The Interior Department did not regard the survey as official until the certified copy of the official plat was filed by direction of the department in the local land office, June 4, 1869. Whether this is to be regarded as the date of the survey or not, we are satisfied that the lands could not be regarded as legally surveyed in such sense as to open them to selection, location, sale, or other disposition till the approved copy of the plat was filed on December 28, 1865. This is the earliest date at which they could be considered open to selection, if open to selection then. The land office was the place for the disposition and record of the public lands; and until they had an authentic official plat of the surveys of the public land, it would be impracticable to keep a record of them or of their disposition. If we are correct in this view, then no valid selection could be made, at the earliest, till December 28, 1865, and this was several months after the grant to the railroad company had indefeasibly attached."

In the case of Sawyer v. Gray, 205 Fed. 160, District Judge Cushman said:

"The township plat having been filed in April, 1901, the lands in dispute were unsurveyed at the time of the first alleged selection, in March, 1900. The government survey

creates, not merely identifies, sections of land. There were no such lands as those described in the first application at the time of selection."

This court will take judicial notice of the rules and regulations requiring approval of surveys by the commissioner of the general land office, and with reference to the filing of the plats of surveys in the local land office of the district in which the land is situated.

Cosmos Exploration Co. v. Gray Eagle Oil Co., 190 U. S. 301;
Caha v. United States, 152 U. S. 211;
Leonard v. Lennox, 181 Fed. 760.

Lands granted to the Northern Pacific Railroad Company are regarded and treated as public lands of the United States until surveyed.

U. S. vs. Montana Lumber & Mfg. Co., 196 U. S. 573;
Carroll v. United States, 154 Fed. 425.

The grant made to the Northern Pacific Railroad Company was a grant *in praesenti* and legal title to the lands granted passed from the United States upon the identification of the lands.

Deseret Salt Co. v. Tarpey, 142 U. S. 241;
Northern Pacific Ry. Co. v. Myers, 172 U. S. 589;
U. S. v. Montana Lumber Mfg. Co., 196 U. S. 573.

After survey and before patent issues the railway company can maintain ejectment to recover possession.

Northern Pacific Ry. Co. v. Myers, 172 U. S. 589.

Until the survey is complete and becomes final it may be rejected and a new survey ordered.

City of New Orleans v. Paine, 147 U. S. 261.

In the case just cited the court said:

> "If the department was not satisfied with this survey, there was no rule of law standing in the way of its ordering another. Until the matter is closed by final action, the proceedings of an officer of the department are as much open to review or reversal by himself, or his successor, as are the interlocutory decrees of a court open to review upon the final hearing."

Where the map of a survey has been filed in the local land office and a patent is issued for lands identified by, and embraced within, the survey, or the legal title attaches to land embraced within the survey by virtue of a grant already made, the jurisdiction of the land department ceases as to such land.

Moore v. Robbins, 96 U. S. 530;
Peyton v. Desmond, 129 Fed. pp. 1-8.

In the opinion in the case last cited the court said:

> "The issuance of a patent, or such other act as passes the legal title from the government, is the final act, and is the expression and entry of the final judgment of the officers of the Land Department; and this is the act that marks the termination of the jurisdiction of these officers and the beginning of the jurisdiction of the courts." (Citing many cases.)

In the opinion in the case of United States v. Morrison, 240 U. S. 192, the court said:

> "Reference is made to the terms of the territorial act of 1848 (supra) with respect to the reservation of the described sections when the lands were 'surveyed * * * * preparatory to bringing the same into market,' but this provision furnishes no ground for the contention that an incomplete and unapproved survey was intended. Much less can it be said that, under the grant of the enabling act of 1859, the title would pass at any intermediate stage of the survey. Nor is there merit in the contention that is based on sec. 2275 of the Revised Statutes as amended by the act of February 28, 1891 (supra), protecting settlements when made 'before the survey of the lands in the field.' That act imposes no limitation upon the authority of Congress to dispose of the lands before title passes to the state; and if title passes upon survey, it must be upon a survey duly completed according to the authorized regulations of the Department. It is said, however, that in this case the plat was officially used by the Commissioner of the General Land Office and the Secretary of the Interior in connection with the withdrawal under consideration, and hence that the survey must be deemed to have been officially approved. Wright v. Roseberry, 121 U. S. 488, 517, 30 L. ed. 1039, 1047, 7 Sup. Ct. Rep. 985; Tubbs v. Wilhoit, supra. It is true that the lands withdrawn were conveniently described according to townships, and that the official correspondence referred to an accompanying diagram showing the townships and sections. But neither the correspondence nor the diagram contained any reference to a sur-

> vey of the lands in question or constituted an approval of a survey. These lands still remain to be officially defined in the appropriate manner, and according to the agreed statement the survey was accepted by the Commissioner of the General Land Office, as stated, on January 31, 1906, and was filed in the local land office on November 16, 1907, entries during the interval having been suspended pending certain investigations. We think that it is immaterial that the survey was finally approved by the Commissioner without modification, for pending the approval it remained in his hands, officially incomplete, awaiting the result of his examination."

As the filing of a map of the survey in the local land office is one of the acts required to be performed in the administration of the laws of the United States relating to the survey of public lands, it follows that until the filing is made the survey may be rejected and a new survey ordered. When, however, the map has been filed and the legal title of the railway company has attached to lands embraced within the survey, the jurisdiction of the land department as to such land ceases. The filing of the map of the survey must, therefore, be the act which changes the character of the land from that of public land to that of private property.

We, therefore, submit that the lands described in the complaint did not become subject to state taxation until the plats of the surveys had been filed in the local land office, and, as the plats of the surveys of the land, described in the third

cause of action, were not filed until after the first day of March, 1916, the lands were not taxable for as we have already shown, it is only property in existence and property which has a taxable status at twelve o'clock noon on the first Monday in March of any year that may be taxed for that year.

Sections 2510 and 2511 of the Revised Codes of Montana of 1907.
Clearwater Timber Co. vs. Shoshone County, 155 Fed. 613.

In conclusion, we respectfully submit that the judgment of the lower court is correct and should be affirmed as to the first and second causes of action, and that the judgment on the third cause of action is erroneous and should be reversed, and judgment ordered for the railway company.

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